IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CRIMINAL APPEALLTE JURISDICTION.

CRIMINAL APPEAL NO. 267 OF 2003

Jony @ Abdul Rahim Abdul Khalik Shaikh ....Appellant.
V/s (Orig.Accd. No.2)
The State of Maharashtra ..... ....
Respondents.

Mr.A.Q.Ansari, Adv. for the appellant.

Mr.P.S.Hingorani, APP for the State.

**CORAM: V.G. PALSHIKAR**
AND
**SMT.NISHITA MHATRE, J.**

13th Nov., 2006.

**ORAL JUDGMENT: (Per Palshikar, J.)**

Being aggrieved by the judgment and order of conviction and sentence passed by the learned IInd Ad-hoc Additional Sessions Judge, Kalyan in Sessions Case No.22 of 2000 on 23.12.2002 the appellant-accused has preferred this appeal on the grounds mentioned in the memo of appeal as also verbally canvassed before us.

2. With the assistance of the learned Advocate for the appellant as also the learned Public Prosecutor we have scrutinized the entire evidence on record and reappreciated the same.

3. The prosecution case briefly stated is that deceased Mukhtar Ahmed Khan was residing at Woolen Chawl of Ambernath and he was running a garage in the same city. On 21.5.1999 in the morning

complainant Tahsin planned to go with her father Mukhtar to bring her grand father from his shop. Her father Mukhtar was preparing to got out. At the same time her mother asked her to bring beetle leaves. Till complainant Tahsin returned with beetle leaves her father left on scooter. On the advise of her mother complainant left her house to bring her grand father by auto rickshaw. She saw her father standing on the road leading to Woolen Chawl from Kalyan-Badlapur road with his scooter. Her father asked her to cross the road cautiously. At that time one Kawal and two persons were standing near her father having their back towards the complainant. One of them caught hold hair of her father and inflicted a blow. Another person having lanki personality also inflicted blow on her father. Then the person who caught hold hair of her father pushed her father and turned, he was Johny son of Kawal. Thereafter all the three assailants ran towards the road leading towards Woolen Chawl. Tahsin who was frightened by this incident, turned towards the hotel of her maternal uncle, disclosed this fact to Mustakin and asked him to send her mother. Then at about 9.40 SHO PSI K.D.Aware prepared inquest panchnama of the dead body, sent it along with police report, requisition letter etc. to M.O., Central Hospital, Ulhasnagar along with police constable M.R.Rajguru B.No.5242. At about 10 a.m. In the same morning Tahsin Mukhtar Khan lodged report to police station Ambernath.

4. Accordingly investigation was conducted and the accused were arrested and on completion of investigation they were prosecuted. The prosecution examined 10 witnesses to prove its case and the learned trial Judge on appreciation of evidence came to the conclusion that no offence is disclosed to have been committed by accused Nos. 1, 3 and 4. He therefore acquitted them and convicted accused No.2 the present appellant as above. The basic contention raised by the learned counsel on behalf of the appellant is that the Sessions Judge having appreciated the evidence and acquitted the three accused persons, he should not have in law convicted the appellant because the same set of evidence was rejected in so far as other three accused are concerned. The argument though appears to be attractive at the first instance, is devoid of any merit as will be seen from the discussion of the evidence as reappreciated by us.

5. PW1-Tahsin Mukhtar is the daughter of the victim and eye witness to the assault. Her deposition reveals the natural manner in which she has recited the incidence which she saw. The whole happenings must have made a dent on her mental matrix and therefore she was able to state before the Court with clarity the manner in which the incidence occurred although assault took place. She describes the injuries caused to her father by the accused. She identifies the assailants, admits the enmity between two families and

has thus told before the Court everything that she knew about the whole incidence. She has been searchingly cross examined but there is nothing in cross examination to warrant rejection of her evidence in toto. We have to bear in mind the age of the witness, the circumstances in which she was required to testify. We cannot therefore because of certain minor omission reject her evidence in toto.

6. There is another reason why the evidence of PW1 is liable to be accepted. PW3-Praveen Khan is the wife of the victim, mother of PW1. She has also seen dead body of her husband and she has also deposed to the Court the injuries inflicted on the victim. She also very frankly admits omissions in her statement. Her evidence therefore independently corroborates the testimony of PW1. Evidence of PW6-Dr.Sushauta Sakalkar is yet another corroboration available to the testimony of PW1 and PW3. In our opinion, Pws 1 and 3 are natural witnesses, their presence on the spot is natural and their evidence is completely corroborated by medical evidence given by PW6 the doctor who conducted the post mortem. Pws 4 and 5 are witnesses to the panchnama Exh.62 which is duly proved. Pw7-Omashankar Tiwari is declared hostile. PW8-Bhagwan Patil is the officer who prepared the charge sheet. PW9-Girish Umbrage is the officer who arrested the accused and recovered the weapon of offence at the instance of

accused No.2-appellant. He has proved seizure panchnama and it is evident therefrom that the gupti was recovered at the instance of the present appellant. Pw10-Shaikh Ismail is the investigating officer.

7. A scrutiny of evidence of Pws 1 and 3 is duly corroborated by testimony of the doctor and the inspector at whose instance recovery was effected discloses that everything is done by accused No.2 the present appellant. No eye witness attributes any role of any other accused, no action as taken by any other accused is even mentioned and it was because of such non mentioning of those persons that the learned trial Judge has shifted the evidence and acquitted those persons whose names were not mentioned and convicted the appellant. That exactly what is expected of a diligent Judge. He has to shift the evidence and decide the issues in accordance with law. We are in total agreement with the learned trial Judge on his findings as recorded by him. We also are of the opinion that it was present appellant who alone was responsible for the death of the victim and therefore the order of conviction and sentence is proper. Merely because some of the accused persons have been acquitted for lack of evidence it cannot be said that for the same reason even others who have been mentioned and against whom there is ample evidence should also be acquitted. In our opinion, there is no substance in this appeal and same deserves to be dismissed. It is accordingly

dismissed.